

# Court of Appeals, State of Michigan

## ORDER

Jorge Ferrer v County of Wayne

Docket No. 254310

LC No. 99-923846-NZ

Michael J. Talbot  
Presiding Judge

Brian K. Zahra

Pat M. Donofrio  
Judges

---

On the Court's own motion, the June 16, 2005 opinion is hereby AMENDED. The opinion contained the following clerical error: lower court number reads as 99-923842-NZ, the correct lower court number is 99-923846-NZ.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 05 2005

Date

*Sandra Schultz Mengel*  
Chief Clerk

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

JORGE FERRER and KATHLEEN FERRER,

Plaintiffs,

V

WAYNE COUNTY,

Defendant-Third Party Plaintiff-  
Appellee,

and

SIMS VARNER & ASSOCIATES, SVA  
GROUP, INCORPORATED, JOHN DOE  
SUBCONTRACTOR, MAT FLEX,  
INCORPORATED, RAPISTAN  
INCORPORATED,

Defendants,

and

WALBRIDGE ALDINGER COMPANY,

Defendant-Counter Plaintiff-  
Appellee,

and

SA COMUNALE, INCORPORATED,

Defendant-Counter Defendant-  
Appellant,

and

NORTHWEST AIRLINES,

Third Party-Defendant-Appellee.

---

UNPUBLISHED

June 16, 2005

No. 254310

Wayne Circuit Court

LC No. 99-923842-NZ

---

Before: Talbot, P.J. and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant S.A. Comunale, Incorporated, (SAC) appeals by leave granted, a partial judgment against it and in favor of defendants Walbridge Aldinger, Wayne County and Northwest Airlines, as well as an order directing that a show cause hearing and creditors' examination be held. On appeal, among other arguments, SAC asserts that the trial court's entry of a partial judgment was error because the trial court did not follow this Court's order directing it to conduct a hearing to determine the amounts, if any, SAC must pay Walbridge Aldinger, Wayne County, and Northwest Airlines. Because the trial court acted in contravention of this Court's order when it failed to hold an evidentiary hearing requiring Walbridge Aldinger, Wayne County, and Northwest Airlines to establish that the amounts they paid to settle plaintiffs' claims were reasonable, we reverse and remand.

Plaintiffs brought this action against Wayne County, Walbridge Aldinger, SAC and others to recover for the injuries plaintiff Jorge Ferrer sustained when an overhead fire door closed on him as he was walking in the international terminal at Detroit Metropolitan Airport. SAC is a subcontractor who installed a fire control system at issue. Plaintiffs alleged various claims of negligence and gross negligence, trespass nuisance, breach of warranties, product liability, and breach of contract against the named defendants. Walbridge Aldinger filed a cross-claim against SAC as the entity that designed, fabricated, and installed the fire suppression system in the terminal.

The trial court granted summary disposition on issues of liability in favor of Wayne County, Northwest Airlines, and Walbridge Aldinger and ordered SAC to defend and indemnify Wayne County, Northwest Airlines, and Walbridge Aldinger in the action filed by plaintiffs. SAC sought interlocutory review of the trial court's order relating to the liability and indemnity issues. A panel of this Court denied SAC's application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." *Ferrer v Co of Wayne*, unpublished order of the Court of Appeals, issued 04/21/2003 (Docket No. 244542).

The case proceeded and subsequently Walbridge Aldinger, Wayne County, and Northwest Airlines settled with plaintiffs. Walbridge Aldinger and Wayne County settled for \$141,600 each, and Northwest Airlines settled for \$75,000. The trial court later entered an order directing SAC to reimburse Walbridge Aldinger, Wayne County, and Northwest Airlines for the amounts they paid to plaintiffs based on an earlier holding that SAC was the insurer of Walbridge Aldinger, Wayne County, and Northwest Airlines pursuant to its subcontract with the parties. The trial court also ordered that if SAC did not pay Walbridge Aldinger, Wayne County, and Northwest Airlines by a date certain, then SAC must pay \$500 a day to each of the three defendants until it complied with the order. Instead of complying with the trial court's order, SAC once again sought interlocutory review in this Court. This Court entered an order that provided, in part,

Pursuant to MCR 7.205(D)(2), the Court orders that the February 10, 2004 order for a show cause hearing on February 19, 2004 and the January 23, 2004 order on Wayne County's emergency motion for contempt of court are VACATED, and this matter is REMANDED for a hearing for a determination of

the amount of money S.A. Comunale must reimburse Walbridge Aldinger, Wayne County and Northwest Airlines for their settlements of claims with plaintiffs and entry of a partial judgment reflecting that decision. [*Ferrer v Co of Wayne*, unpublished order of the Court of Appeals, issued 02/19/2004 (Docket No. 253764).]

Following receipt of this Court's order, SAC asked the trial court to schedule a hearing, consider briefs and arguments and allow discovery. The trial court held two hearings where it considered SAC's arguments and responses from Walbridge Aldinger, Wayne County, and Northwest Airlines but took no further evidence and did not conduct any discovery. Stating that it would not allow relitigation of issues already resolved, the trial court entered an order of partial judgment in favor of Walbridge Aldinger, Wayne County, and Northwest Airlines against SAC, ordering SAC to pay Wayne County and Walbridge Aldinger \$141,600 each and Northwest Airlines \$75,000. SAC moved for stay of execution and stay of proceedings. Walbridge Aldinger, Wayne County, and Northwest Airlines moved for a show cause hearing and a creditors' exam. The court denied SAC's motions and granted the motion for a show cause hearing and creditors' exam.

SAC filed an application for leave to appeal the trial court's latest orders arguing that the trial court's partial judgment must be overturned because the trial court did not follow this Court's order to conduct a hearing to determine the amounts, if any, it must pay each of the other defendants and by merely rubberstamping the partial judgment proposed by Walbridge Aldinger, Wayne County, and Northwest Airlines. SAC further asserted that the trial court erred in concluding it had waived all defenses to the claims for reimbursement and challenged the merits of the order of partial judgment. Finally, SAC argued that the trial court erred in ordering the show cause hearing and creditors' exam. This Court granted SAC's application for leave to appeal and stayed all further proceedings pending resolution of the appeal.

On appeal, SAC first argues that the trial court's entry of a partial judgment was error. Pursuant to *St Luke's Hospital v Giertz*, 458 Mich 448; 581 NW2d 665 (1998):

A person legally liable for damages who is entitled to indemnity may settle the claim and recover over against the indemnitor, even though he has not been compelled by judgment to pay the loss. In order to recover, the indemnitee settling the claim must show that the indemnitor was legally liable, and that the settlement was reasonable.<sup>1</sup> [*Id.* at 454, quoting 41 Am Jur 2d, Indemnity, § 46, p 380.]

This Court has also stated that in determining whether a settlement amount was reasonable in an indemnity claim, the fact finder must engage in a two part analysis. *Trim v Clark Equipment Co*, 87 Mich App 270, 278; 274 NW2d 33 (1978). "The reasonableness of the settlement consists of two components which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if

---

<sup>1</sup> The statement is continued: "In the event that an indemnitor is not afforded the alternative of participating in a settlement or conducting the defense against the original claim, an indemnitee settling the claim will have the burden of establishing actual liability to the original plaintiff rather than the lesser burden of showing potential liability."

the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed.” *Id.*

The trial court held two hearings where it explained that it had considered, on more than one occasion, all the legal arguments SAC had previously raised and that it would not consider any new arguments. It held that SAC had not shown that the court had erred in deeming SAC as the other defendants’ insurer and in concluding that SAC should indemnify those defendants. SAC does not challenge this holding at this time on appeal but instead argues that the trial court erred when it did not hold an evidentiary hearing or take any evidence to determine the exact amounts SAC is required to pay Walbridge Aldinger, Wayne County, and Northwest Airlines according to its duty to indemnify. SAC argues that the trial court acted in direct contravention of this Court’s order directing the trial court to hold a determination hearing when it did not require Walbridge Aldinger, Wayne County, and Northwest Airlines to show that the amounts they paid to settle plaintiffs’ claims were reasonable.

Our review of the record reveals that there is no dispute regarding the actual amounts Walbridge Aldinger, Wayne County, and Northwest Airlines paid according to their settlement agreements with plaintiffs. There also appears to be no dispute that plaintiffs received payment according to the settlement agreements they reached with Walbridge Aldinger, Wayne County, and Northwest Airlines. However, there is nothing in the record indicating that the trial court required Walbridge Aldinger, Wayne County, and Northwest Airlines to make the required showing of reasonableness. Walbridge Aldinger, Wayne County, and Northwest do not assert that they provided proof or evidence that the amounts of their respective settlements with plaintiffs were reasonable.

*St Luke’s Hospital, supra*, plainly requires that Walbridge Aldinger, Wayne County, and Northwest Airlines show that the settlement amounts were reasonable. Further, the decision of an appellate court is controlling at all subsequent stages of litigation, so long as it is unaffected by a higher court’s opinion. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). Therefore, the trial court doubly erred when it did not carry out this Court’s directive and hold a “hearing for a determination for the amount of money S.A. Comunale must reimburse Walbridge Aldinger, Wayne County and Northwest Airlines for their settlements of claims with plaintiffs . . .” and instead simply ordered SAC to pay the amounts Walbridge Aldinger, Wayne County, and Northwest paid to plaintiffs in their respective settlements. We remand this case to the trial court in order for the trial court to require Walbridge Aldinger, Wayne County, and Northwest to show reasonableness in accordance with *St Luke’s Hospital, supra*, and *Trim, supra*.

SAC also argues that Walbridge Aldinger, Wayne County, and Northwest have not provided evidence to demonstrate that they, not their insurers, actually paid the settlement amounts. SAC suggests that if insurers paid the settlement and not the parties, then SAC should not be required to indemnify Walbridge Aldinger, Wayne County, and Northwest because they did not suffer damages. SAC provides no authority to support this position. SAC may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Also, SAC may not give issues cursory treatment with little or no citation of supporting authority. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

In any event, it is well-settled that an insurer is not required to defend its insured against claims specifically excluded from policy coverage. *Protective Nat’l Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991). With this in mind, we conclude that any

question regarding who paid the settlement amount Walbridge Aldinger, Wayne County, and Northwest or their respective insurers is a dispute that should be resolved by those entities and not by SAC. There is nothing in the record to indicate that the reasonableness of the settlement amounts or SAC's duty to indemnify has anything at all to do with whether plaintiffs received the settlement amounts from Walbridge Aldinger, Wayne County, and Northwest or their respective insurers.

SAC likewise challenges the trial court's order directing the parties to appear for a show cause hearing and creditors' examination and requiring a person in charge of SAC to appear. While SAC has provided no authority to support its argument that this order is erroneous, in light of our conclusion that the case must be remanded for a proper hearing, we must also vacate the trial court's order directing the parties to appear for a show cause hearing and creditors' examination and requiring a person in charge of SAC to appear on the basis that it is now moot. See *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999) ("This Court need not address issues that have become moot.").

Finally, SAC raises issues relating to the merits of the trial court's findings of liability against it. SAC raised these issues in a prior application for leave to appeal to this Court. A panel of this Court denied the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." SAC recognized this Court's previous denial in its brief on appeal and stated that it would once again appeal "after the final order is entered." Nothing has changed factually in the case, therefore, we respect the previous panel's order and decline to review this argument on subsequent interlocutory appeal. Similarly, we decline to review SAC's argument that the trial court erroneously concluded that it waived all defenses to the claims for reimbursement. This issue relates to the liability issues raised in the prior application for leave to appeal to this Court. Because this issue relates to liability issues and does not relate at all to the determination hearing, we decline to review it on subsequent interlocutory appeal. We deem other issues raised by the parties to be without merit.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Pat M. Donofrio